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The Model Law on International Commercial Arbitration: It's Time for Michigan to Adopt It

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By Kevin C. Kennedy*

The state of Michigan stands poised to capture a unique economic opportunity stemming from the Canada-U.S. Free Trade Agreement which went into effect on January 1, 1989. In anticipation of the increased trade and investment flows that will result between the United States and Canada as a direct result of the Free Trade Agreement's liberalization of trade and investment rules, interest in and demand for private dispute resolution will be heightened on both sides of the border.

In order to realize its full potential as a center for international commercial dispute resolution, the Michigan Legislature should give consideration to enacting legislation which provides specifically for international commercial arbitration. Sound reasons exist for doing so, the most compelling of which are three legal developments that occurred in the 1980's.

The first came in 1985 with the U.S. Supreme Court's landmark decision in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*,[1] in which the Court endorsed resort to arbitration to resolve international commercial disputes, even when the dispute involved an antitrust claim.

The second occurred in 1986 when Canada became the first country to adopt the Model Law on International Commercial Arbitration,[2] drafted by the United Nations Commission on International Trade Law (the UNCITRAL Model Law). All of Canada's provinces and territories have likewise enacted the Model Law.[3]

The third took place in late 1987 with the signing of the U.S.-Canada Free Trade Agreement, offering the genuine prospect for tremendous economic growth for Michigan business.

To date, seven states have enacted international commercial arbitration legislation: California, Connecticut, Florida, Georgia, Hawaii, Maryland, and Texas. The UNCITRAL Model Law, these seven state laws, and the federal law dealing with arbitration are summarized below.

THE UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law was established in 1966 by the UN General Assembly to promote the unification of international trade law on a global basis. UNCITRAL has produced substantial results in several areas, including international arbitration and conciliation. In 1976, it produced the UNCITRAL Arbitration Rules, which are comprehensive, up-to-date, and widely accepted. These rules are being used by the U.S.-Iran Claims Tribunal in The Hague. In 1980, UNCITRAL developed a companion set of Conciliation Rules. In 1985, following three years of drafting, UNCITRAL produced the Model Law on International Commercial Arbitration.[4] The Model Law establishes a uniform practice and procedure for arbitration of international commercial disputes and attempts to meet the essential requirements of party autonomy and basic fairness.

In order to realize its full potential as a center for international commercial dispute resolution, the Michigan Legislature should give consideration to enacting legislation which provides specifically for international commercial arbitration.

**The opinions and legislative recommendations contained in this article are those of the author and are not positions of the State Bar of Michigan. This article is taken from remarks made to the Michigan Law Revision Commission.*

The U.S. government strongly supported UNCITRAL's work on the Model Law and was generally satisfied with the final product. In 1986, Canada became the first country to enact the Model Law at the national level. Since then, every province has also adopted it. The Model Law is being given serious consideration in Australia, Germany, the United Kingdom, Egypt, and Hong Kong.

At the state level in the United States, the Model Law was adopted verbatim by Connecticut in 1989 and with only slight modification in California in 1988 and in Texas in 1989. It was used as a basic source of ideas for the Florida International Arbitration Act, with many of the Model Law's provisions being included in the Florida legislation. It also served as a source of ideas for Hawaii's and Georgia's international arbitration statutes.

The Model Law applies in international commercial arbitration. "International" is defined in Article 1:3, generally covering arbitrations where either one of the parties or the subject matter of the arbitration is located in a country other than the place of arbitration. "Commercial" is not defined in the text, but a footnote to Article 1:1 states that a broad interpretation is intended and provides an extensive, nonexclusive list of commercial relationships.

Under the Model Law, courts are permitted to intervene only where explicitly provided. Each state enacting the Model Law specifies the courts or other authorities that will perform the stated functions.

If a court action is brought in a matter which is the subject of an arbitration agreement, Article 8 directs the court, upon the request of a party, to refer the matter to arbitration unless the court finds the agreement to be void, inoperative, or incapable of being performed. Under Article 9, the court may also provide interim measures of protection before or during arbitral proceedings.

Under Article 11:3, the court appoints arbitrators failing party agreement on their selection. The parties are free to agree on the number of arbitrators, but absent agreement, the number is three (Art. 10). A party may challenge an arbitrator and if unsuccessful may request the court to rule on the challenge. The court's decision is non-appealable (Art. 14:3).

Article 34:2 of the Model Law provides seven grounds for setting aside an award or refusing to recognize or enforce it:

- Party incapacity;
- Invalidity of the arbitration agreement under the law chosen by the parties;
- Defective notice of the proceedings that prevented a party from making its presentation;
- The award deals with a dispute beyond the scope of the arbitration agreement;
- The arbitral procedure or composition of the tribunal was not in accordance with the agreement;
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of the state; or
- The award is in conflict with the state's public policy.

(These grounds are identical to the grounds listed in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, discussed below.)

The Model Law also provides procedural protections and the opportunity for the parties to agree on expanded protections. For example, the parties are to be treated equally and each given a full opportunity to present their cases (Art. 18). The parties may submit any relevant documents with their statements of claim or defense and may amend or supplement their statements during the course of the proceedings (Art. 23). The Model Law requires that the parties be given sufficient advance notice of any hearing or other meeting of the arbitral tribunal for the inspection of evidence (Art. 24:2). *Ex parte* communications are prohibited (Art. 24:3).

Absent agreement of the parties, however, the arbitral tribunal has broad authority to determine procedural matters, including the place for arbitration, for hearing witnesses, or for the inspection of evidence (Art. 20:2). Since the arbitral tribunal may conduct the proceedings in any manner it considers appropriate, it also decides whether to hold oral hearings or whether to conduct the proceedings on the basis of documentary evidence alone (Art. 24:1).

The parties may agree on the law to be applied to the substance of the dispute, but absent agreement the arbitral tribunal uses the conflict of laws rules which it determines to be applicable to arrive at the applicable substantive law (Art. 28).

In 1986, Canada became the first country to enact the Model Law at the national level. Since then, every province has also adopted it.

Finally, although the Model Law's aim is to be comprehensive, some aspects of arbitration are not covered by the Model Law, including (1) arbitrability, (2) the capacity of parties to conclude an arbitration agreement, (3) sovereign immunity, (4) consolidation of arbitration proceedings, and (5) enforcement of interim measures issued by the arbitral tribunal.

AN OVERVIEW OF STATE LEGISLATIVE ACTIVITY

The seven states that have enacted international commercial arbitration statutes had one common principal motivation—attracting international business. Whether there is a demonstrable link between such statutes and increased international business in the

state is debatable, but the economic rationale for adopting international commercial arbitration legislation persists, given the states' desire to increase exports, attract foreign investment, and raise employment levels.

In any event, considering that the cost of international commercial arbitration is free to the state, it is hard to argue against the favorable cost/benefit rationale that has been offered by the states that have adopted such legislation. A more favorable attitude of foreign counsel and clients toward the United States as a forum for arbitration may in fact increase foreign trade between the United States and other nations.

In chronological order, Florida was the first state to enact an international commercial arbitration statute. Florida enacted the Florida International Arbitration Act in 1986.[5] It did not use the Model Law as a template, but rather as one of many sources. The goal was to promote Miami as an international commercial center for Latin America. In general, the Florida international arbitration statute provides more procedural detail than its general Arbitration Code.

A relative flurry of legislative activity took place in 1988 with three states enacting international arbitration legislation. California became the second state to enact international arbitration legislation, adopting the Model Law with limited changes.[6] Two significant deviations from the Model Law bear mention.

First, California dropped the last two chapters of the Model Law dealing with recourse against an award and recognition and enforcement of awards. There was evidently some concern that these two chapters might be preempted by federal law, a fear that was probably unwarranted in light of a 1989 U.S. Supreme Court decision to be discussed below.

Second, California added a conciliation section based on the UNCITRAL Conciliation Rules that were adopted in 1980. California's hope was to capitalize on its proximity to Asia and the cultural preference of Asians for nonconfrontational methods of dispute resolution. Foreigners' fears of large American jury verdicts was another reason for adoption of the legislation.

The best reason for Michigan to adopt the Model Law, and with as few modifications as possible, isn't because California, Texas, or Connecticut has done so, but because all of the Canadian provinces have.

Georgia was the next state to enact international arbitration legislation.[7] Georgia, like Florida, considered the Model Law and many other sources in drafting its own 1988 international arbitration legislation. In the end, Georgia relied heavily on New York arbitration statutes as a model. Georgia hoped its new law would encourage investment in the state.

Hawaii adopted a distinctive act in 1988 that promotes not only international arbitration, but mediation and conciliation as well.[8] Like California, Hawaii's dream is to attract trade with Pacific Rim countries. Unlike all the other states, Hawaii has created a Center for International Commercial Dispute Resolution in an attempt to attract international arbitrations that arise not only out of a Hawaii connection, but also international arbitrations with no particular Hawaii nexus.

Two states enacted international arbitration statutes in 1989, Texas and Connecticut. Texas enacted an international arbitration act modeled after California's international arbitration legislation, with the same deletions from and additions to the Model Law.[9] Connecticut adopted the Model Law verbatim.[10]

The last state to adopt an international arbitration statute was Maryland which did so in 1990.[11] Its legislation carves out international commercial arbitrations from coverage under its general arbitration statute, and provides that all such arbitrations are to be governed by federal law.

SOURCES OF FEDERAL LAW ON ARBITRATION

The principal sources of federal arbitration law are the Federal Arbitration Act (the FAA),[12] the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[13] and the Inter-American Convention on International Commercial Arbitration[14] which went into effect in 1990. The FAA applies to all written arbitration agreements covering contracts involving commerce. The policies which the FAA seeks to implement include enforcement of arbitration agreements, effective functioning of the arbitration process, and the establishment of an efficient procedure for judicial involvement in arbitral proceedings and enforcement of arbitral awards.

The New York Convention was ratified and implementing legislation enacted by Congress in 1970.[15] Some 80 countries, including Canada, are parties to it. It provides for judicial recognition and enforcement in U.S. courts of arbitration awards rendered in another country which is a party to the convention. The grounds for denying recognition or enforcement are identical to the seven grounds contained in the Model Law.

The Inter-American Convention[16] essentially mirrors the New York Convention. Its importance is that it complements the New York Convention by including as parties several Latin American countries which are not parties to the New York Convention.

The U.S.-Canada FTA has no provision for private dispute resolution.

Before turning to my recommendation, a few words should be said regarding the issue of preemption. To the extent that a state arbitration statute is not inconsistent with the procedural provisions of the FAA, and does not undermine the substantive federal policy favoring the resolution of disputes by arbitration, there does not appear to be any preemption problem.

In 1989, the U.S. Supreme Court held in *Volt Information Sciences, Inc v Board of Trustees of Stanford University,*[17] that the states are free to go their own way procedurally in this context, as long as they do not undermine the federal policy favoring arbitration. The Court made it clear in the *Volt* decision that Congress did not occupy the field of arbitration when it enacted the FAA, and thus state laws dealing with the subject, even in the interstate setting, are not preempted.

RECOMMENDATION—ADOPT THE MODEL LAW

The Michigan Legislature should adopt the UNCITRAL Model Law with two additions: First, a provision should be added permitting courts to consult the Model Law's *travaux preparatoires* (the legislative history of the Model Law) as an interpretative guide. This provision would follow the pattern used by the Canadian provinces in their respective adoptions of the Model Law. It should increase the likelihood of a uniform interpretation of the Model Law, allay fears that Michigan courts might give the Model Law a parochial or unusual interpretation, and thus make Michigan a more attractive international arbitral tribunal. Second, following the pattern of California and Texas, the UNCITRAL Conciliation Rules should be included in the legislation as well. Conciliation is strictly voluntary; any party may withdraw and proceed to arbitration at will.

The best reason for Michigan to adopt the Model Law, and with as few modifications as possible, isn't because California, Texas, or Connecticut has done so, but because all of the Canadian provinces have. The Legislature should not adopt the Model Law in lieu of the existing arbitration statute, but rather as a supplement to it. Michigan need not replace its statutory scheme for domestic cases that is generally well understood and familiar. An attempt to do so would more likely generate needless opposition than result in the adoption of a statute limited to international disputes.

In fact, few substantive differences exist between the Model Law and the Michigan statute. Yet, the two laws differ markedly in structure and content. First, the Michigan law, modeled after the Uniform Arbitration Act, is clearly the product of a common-law approach to statutory drafting—many statutory gaps to be filled in later by the judiciary. The drafters of the Model Law, by contrast, worked to develop a "code" in the civil law tradition. As a consequence, the Model Law is more comprehensive and fully elaborated than the Michigan statute. For example, there are at least eleven gaps in the Michigan arbitration statute which are addressed in the Model Law. Subjects which the Model Law covers but on which the Michigan arbitration statute is silent include:

- A provision for an award of interim relief.
- The use of experts.
- A challenge procedure.
- Authority for the arbitrator to rule on his or her jurisdiction.
- A provision that a statement of the facts supporting the claim and a response to each of the allegations be filed.
- A detailed default procedure.
- A provision on the language to be used.
- Guidelines on choice of law.
- Procedures in the event of a settlement.
- The form and content of an award.
- An elaborate description of what constitutes an "agreement in writing."

Second, unlike the Michigan law, which was drafted to govern domestic arbitrations between parties in the state, the Model Law addresses many of the special problems that arise only in international arbitrations. In the international context, at least some of the parties and counsel will certainly be unfamiliar with the federal and Michigan law and practice involving arbitration. International parties may have difficulties in using the FAA or the Michigan law to answer questions—beginning with the decision whether to arbitrate in the United States.

In many cases, the more fully articulated Model Law would provide an answer, especially for Canadian parties and counsel for whom the Model Law has been the law for the past three to four years. In most instances, the Model Law would simply provide clearer guidance without radically departing from contemporary U.S. practice. The Model Law would certainly dispense with a foreign lawyer having to parse United States case law for judicial "gap-filler" answers, and then get answers that are not always clear.

This last factor leads to some of the practical reasons for adopting the Model Law. An important consideration in selecting a site of arbitration in an international matter is the parties' perception of the character of the legal regime in which the arbitration will take place. The parties are likely to be concerned about the certainty of the legal regime.

The principal objective of the Model Law is to establish a clear, well-articulated set of rules conducive to international commercial arbitration, an objective which it seems to have achieved. The adoption of the Model Law would, in addition, send a clear message that Michigan is hospitable to international arbitration. A practitioner in Michigan would be able to say to a client or to foreign counsel, "We have adopted a

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Each semester, I share a Chinese proverb with my Civil Procedure class when we come to alternative dispute resolution: "Better to enter the tiger's den than a court of law." That goes double when the court of law is located in the United States from the perspective of our Canadian neighbors who fear American jury awards and loath our free-wheeling discovery machinery. There is obviously more to making Michigan an international commercial arbitration center than the adoption of a statute. Nevertheless, adoption of the Model Law in Michigan could be a very useful first step. ■

Footnotes

1. 473 U.S. 614 (1985).
2. Commercial Arbitration Act, Can. Stat. ch. 22 (1986).
3. *See* Noecker & Hentzen, *The New Legislation on Arbitration in Canada,* 22 Int'l Law. 829 (1988).
4. For a brief description of the UNCITRAL Model Law, *see* Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration,* 20 Int'l Law. 327 (1986).
5. Fla. Stat. Ann. §§ 684.01-.35 (1988).
6. Arbitration and Conciliation of International Commercial Disputes, Cal. Civ. Pro. Code §§ 1297.11-.432 (Deering 1988).
7. Resolution of Conflicts Arising Out of International Transactions, Ga. Code Ann. §§ 7.201-.214 (1989).
8. Hawaii International Arbitration, Mediation, and Conciliation Act, Haw. Rev. Stat. §§ 658D-1 to -9 (1988).
9. Arbitration and Conciliation of International Disputes, Tex. Rev. Civ. Stat. Ann. art. 249-1 to 249-43 (Vernon 1989).
10. UNCITRAL Model Law on International Commercial Arbitration, 1989 Conn. Acts 261 (Reg. Sess.), Pub. Act No. 89-179.
11. Maryland International Commercial Arbitration Act, 1990 Md. Laws 333.
12. 9 U.S.C. §§ 1-14.
13. 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970).
14. 14 Int'l Leg. Mat. 336 (1990).
15. 9 U.S.C. §§ 1-14, 201-208 (1988).
16. Pub. L. No. 101-369, 104 Stat. 448 (1990).
17. 109 S. Ct. 1248 (1989).

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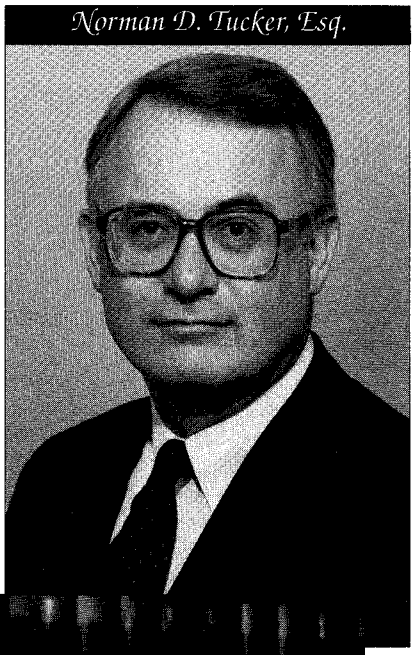
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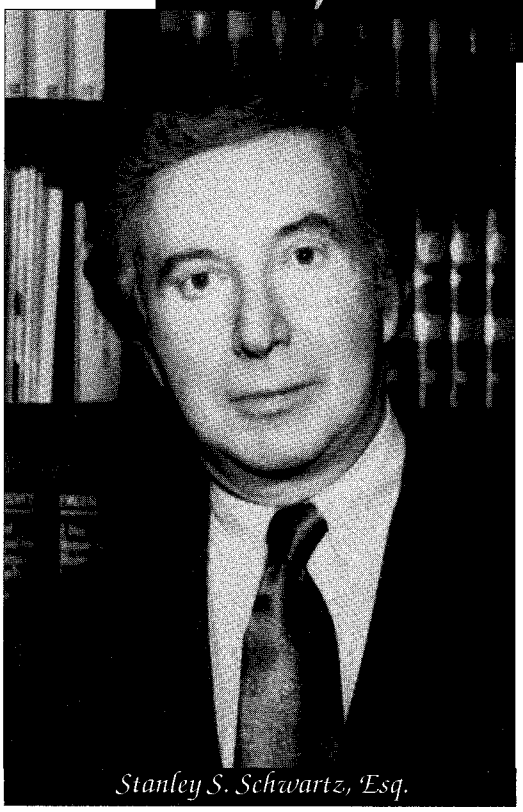
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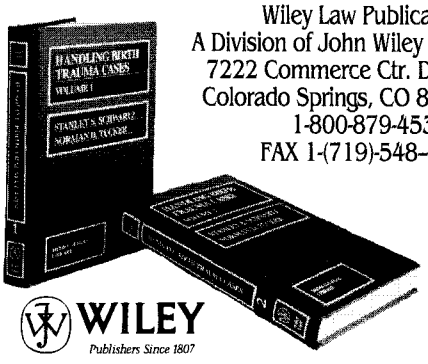

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